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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 IN RE:

4 STANDARD & POORS LITIGATION

13 MD 2446 (JMF)

5 -----x

New York, N.Y.

6 July 11, 2013

7 2:00 p.m.

8 Before:

9 HON. JESSE M. FURMAN,

District Judge

10 APPEARANCES

11 ARIZONA OFFICE OF ATTORNEY GENERAL

12 BY: SUSAN MYERS

13 ARKANSAS OFFICE OF ATTORNEY GENERAL

14 BY: JAMES DePRIEST

15 COLORADO OFFICE OF ATTORNEY GENERAL

16 BY: ANDREW McCALLIN  
JENNIFER DETHMERS

17 DELAWARE OFFICE OF ATTORNEY GENERAL

18 BY: GREGORY STRONG  
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19 DISTRICT OF COLUMBIA OFFICE OF ATTORNEY GENERAL

20 BY: GRANT MOY, JR.

21 IDAHO OFFICE OF ATTORNEY GENERAL

22 BY: OSCAR KLAAS

23 IOWA OFFICE OF ATTORNEY GENERAL

24 BY: STEVEN ST. CLAIR  
JEFFREY THOMPSON

25 MAINE OFFICE OF ATTORNEY GENERAL

BY: LINDA CONTI

D7BTSTAC

## APPEARANCES

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BY: MIMI LIU

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(In open court)

DEPUTY CLERK: Matter of the Standard & Poors  
litigation, 13 MD 2446.

THE COURT: The way we're going to do the notice of  
appearance is I will say the name of a party, and I'm going to  
say it by state, and I will ask one counsel for each party to  
identify him or herself and whoever else he wants to note for  
record.

So starting with the State of Arizona, appearance  
behalf of Arizona.

MS. MYERS: Susan Myers for the State of Arizona.

THE COURT: Welcome.

State of Arkansas.

MR. DePRIEST: James DePriest, your Honor, on behalf  
of the State of Arkansas.

THE COURT: Thank you.

State of Colorado.

MR. McCALLIN: Good afternoon, your Honor, Andy  
McCallin for the State of Colorado, and with me is Jennifer  
Dethmers.

THE COURT: State of Delaware.

MR. STRONG: Good afternoon, your Honor, Gregory  
Strong on behalf of the State of Delaware, deputy attorney  
general, and with me is Jillian Lazar, assistant attorney  
general.

D7BTSTAC

1 THE COURT: The District of Columbia.

2 MR. MOY: Good afternoon, your Honor, Grant Moy for  
3 the District of Columbia.

4 THE COURT: Idaho.

5 MR. KLAAS: Oscar Klaas for Idaho.

6 THE COURT: Iowa.

7 MR. ST. CLAIR: Steve St. Clair, assistant attorney  
8 general for Iowa, with a Jeffrey Thompson, deputy attorney  
9 general.

10 THE COURT: Maine.

11 MS. CONTI: Linda Conti, assistant attorney general  
12 for the State of Maine.

13 THE COURT: Mississippi.

14 MS. LIU: Good afternoon, your Honor, Mimi Liu on  
15 behalf of Mississippi, and with me is Mary Jo Woods.

16 THE COURT: Missouri.

17 MS. YEAGER: Joyce Yeager, assistant attorney general  
18 for the State of Missouri.

19 THE COURT: North Carolina.

20 MR. WOODS: Good afternoon, your Honor, Phillip Woods  
21 on behalf of North Carolina.

22 THE COURT: Pennsylvania.

23 MR. ABEL: Good afternoon, your Honor, John Abel on  
24 behalf of the Commonwealth of Pennsylvania.

25 THE COURT: South Carolina.

D7BTSTAC

1 MR. LIBET: Jared Libet for South Carolina. Along  
2 with me is Sonny Jones.

3 THE COURT: Tennessee.

4 MS. RYBAKOFF: Good afternoon, your Honor, Olha  
5 Rybakoff, senior counsel with the Tennessee Attorney General's  
6 Office, and with me is Jennifer Peacock, senior counsel, and  
7 Jeffrey Hill, senior counsel.

8 THE COURT: And Washington.

9 MS. SMITH: Shannon Smith on behalf of the State of  
10 Washington.

11 THE COURT: Thank you.

12 And for the McGraw-Hill defendants and/or plaintiffs.

13 MR. ABRAMS: Good afternoon, your Honor, Floyd Abrams  
14 for the defendants with my partners Susan Buckley, Adam  
15 Zurofsky and Jason Hall.

16 THE COURT: And for the Moody's parties.

17 MR. RUBINS: Good afternoon, your Honor, Joshua Rubins  
18 for Moody's with my partners James Coster and Glenn Edwards.

19 THE COURT: Is there someone who has not noted an  
20 appearance who would like to?

21 Very good. Now I'm going to ask, for the time being,  
22 my anticipation is that the folks who will do most of the  
23 speaking will either be in my chair or at the front tables, but  
24 for a little while least identify yourself before you say  
25 anything since I'm still learning who you are and certainly the

D7BTSTAC

1 court reporter is learning who you are.

2 We are here for the initial conference in this MDL  
3 proceeding, and I received and reviewed the preconference  
4 letters dated June 28 from the parties, all of which have been  
5 docketed and all of which were very helpful to me in preparing  
6 for today, so thank you for those.

7 Pursuant to my endorsement on one of those letters, my  
8 endorsement dated July 8, I appointed Ms. Rybakoff from the  
9 Tennessee Attorney General's Office as lead counsel, and  
10 Mr. Strong from the Delaware Department of Justice as liaison  
11 counsel.

12 At my request, I also received yesterday various  
13 submissions relating to the motion filed by -- I want to call  
14 them McGraw-Hill defendants, S&P for the time being, Moody's in  
15 the Mississippi action, seeking an enlargement of time and  
16 remand related discovery, that is to say, additional materials  
17 that were not on the docket in that action.

18 Now insofar as I have considered those materials in  
19 connection with today's proceedings, I am inclined to think  
20 they should be docketed as well, but I wanted to check if see  
21 any objection to that.

22 MR. ABRAMS: No objection.

23 MR. RUBINS: No objection.

24 MS. LIU: No objection.

25 THE COURT: I am familiar with the facts and the

D7BTSTAC

1 background of the cases from your letters and from my review of  
2 various other papers that have been filed in the individual  
3 actions. Now in that regard, you should not assume that you  
4 need to recount the full background of the case and can assume  
5 familiarity with what was put in the letters and the like.  
6 With that in mind, I'm happy to what hear from counsel if  
7 there's anything else I should know or any updates since the  
8 June 28 letters. So why don't I start with Ms. Rybakoff.

9 MS. RYBAKOFF: Thank you, your Honor.

10 Your Honor, the states' submissions sets forth the  
11 summary and history of the various state enforcement actions.  
12 As the Court may have gathered, to the extent these are civil  
13 law enforcement proceedings, moving forward swiftly and  
14 efficiently is of paramount importance to the states. And the  
15 issue that the states submit and request that the Court  
16 consider first and foremost is the threshold issue of subject  
17 matter jurisdiction. That matter has been almost fully briefed  
18 in most of the proceedings. I believe in the majority of the  
19 cases the briefs have been submitted. There are some responses  
20 and replies that we have discussed in the pleadings that may be  
21 due, but we respectfully ask that the Court consider those  
22 matters first before anything else.

23 The states also, since the submissions were made and  
24 since these matters were filed, have been working collectively,  
25 which is something that we do regularly, and advancing the case

D7BTSTAC

1 forward, and we do want to see our respective cases prosecuted.  
2 But on behalf of the states, that is a request that we would  
3 make to the Court before anything else. And of course, we're  
4 happy to answer any questions the Court may have.

5 THE COURT: OK. I suppose it might have been helpful  
6 for me to give you a sense of the agenda today and what my  
7 intentions are. My intention is to set a schedule for briefing  
8 of remand motions and the motions to dismiss as to declaratory  
9 judgment actions, and we will also talk about the schedule for  
10 other pretrial proceedings. I agree with the proposal I think  
11 of all parties that the jurisdictional issues should be  
12 addressed first and relatively quickly.

13 Before I hear from counsel for S&P and Moody's, a  
14 couple of housekeeping questions. I gather from your letters  
15 there was an action filed in Indiana on June 27, and there was  
16 an indication that may likely come to federal court and join  
17 these proceedings. Can you tell me the status of that case?

18 MS. RYBAKOFF: That case was filed. It's our  
19 understanding, your Honor, that responsive pleadings have not  
20 been filed yet, and presumably the defendants are going to seek  
21 to move the case to federal court.

22 THE COURT: All right. I'll ask Mr. Abrams in a  
23 moment.

24 And I understand there were motions to stay the  
25 filing, and I gather Delaware, Maine and Mississippi, all of



D7BTSTAC

1 which stay the case as pending the decision by the MDL panel.  
2 That has obviously been mooted. And should those be denied as  
3 a formal matter? I don't know if they remain live motions.  
4 I'm prepared to deny them as a housekeeping matter, but I don't  
5 know if that's necessary.

6 MS. RYBAKOFF: From a housekeeping standpoint that  
7 would seem to make sense at this point. The Court has a  
8 superseding order in place, of course, staying everything as we  
9 move forward with these proceedings. That would seem to make  
10 sense.

11 THE COURT: Anyone wish to be heard on that or object  
12 to my just denying the motions to stay that I gather remain  
13 pending in Delaware, Maine and Mississippi?

14 Seeing no objection, I will deny those as moot.

15 Anything further before I hear from counsel?

16 MS. RYBAKOFF: Not at this time, your Honor.

17 THE COURT: All right. Mr. Abrams?

18 MR. ABRAMS: Good afternoon, your Honor. First, just  
19 to report on the Indiana situation that you asked about, we  
20 have been in touch with the attorney general's office in that  
21 state. We have advised them that we do intend to remove the  
22 case still in state court now and to take steps to put that  
23 case before you as part of this proceeding.

24 We have asked them if they would agree to be bound by  
25 whatever schedule your Honor sets with respect to the remand

D7BTSTAC

1 motions. They have said they will get back to us. They  
2 haven't done it. I'm not criticizing them, they haven't got  
3 back to us yet, but we expect to be hearing from them promptly.  
4 In any event, whatever their response is to that, I think you  
5 can assume that that matter will be before you.

6 Beyond that, I have nothing to say by way of  
7 introduction except that we agree as well that you should deal  
8 with the remand issue first, and counsel have agreed on a  
9 proposed schedule, subject to your approval on that.

10 THE COURT: Very good. Any idea of the timing of the  
11 Indiana action, when it might arrive here?

12 MR. ABRAMS: We would expect to remove the case within  
13 the next week, and promptly, within a day or so, file the  
14 appropriate papers for it to be transferred here on a  
15 conditional basis, unless the state objects to that.

16 THE COURT: OK. Thank you.

17 Mr. Rubins, is there anything that you would like to  
18 add?

19 MR. RUBINS: Thank you, your Honor. I have no updated  
20 information related to Moody's involvement in the Mississippi  
21 action. I would simply, your Honor, say that you intend to set  
22 a schedule for the remand briefing, it's unclear whether that  
23 also would include the 2011 remand briefing. And I think your  
24 Honor knows from our letter that our recommendation is that the  
25 briefing on the 2011 remand, only in Mississippi, which is not

D7BTSTAC

1 ripe for briefing because of pending discovery motion, we defer  
2 it until after the briefing on the federal question  
3 jurisdictional issue applicable to all the cases because that  
4 might render the other moot.

5 THE COURT: OK. Well, why don't we turn to that,  
6 which is ripe for discussion.

7 Just so you know, I ask S & P, if you don't mind, to  
8 submit a proposed order consistent with whatever we do today.  
9 So if you could just pay attention, I suppose, and I know you  
10 would pay attention, but if you pay attention with that in  
11 mind, I appreciate it.

12 So Mr. Rubins, you can have a seat if you like. I am  
13 going to address the issue that you just raised in a moment.

14 Turning to the schedule, let's begin by discussing the  
15 briefing schedule for the motions and structure of that  
16 briefing. As I know from your letters, there were basically  
17 motions to remand in most of the removed actions except the  
18 District of Columbia action, although I think if I found no  
19 subject matter jurisdiction that, even in the absence of a  
20 motion, that ruling would apply in the District of Columbia as  
21 well since jurisdiction is not something that can be waived.

22 Then there are obviously the motions to dismiss that  
23 were filed in the two declaratory judgment actions in South  
24 Carolina and Tennessee. My understanding from your letter is  
25 that your proposal is to have two sets.

D7BTSTAC

1           Let's turn first to the remand motions. My  
2           understanding is that the proposal on the table is to have two  
3           sets of briefing, one for Mississippi specific issues, that is  
4           Mississippi unique issues, and one for issues and arguments  
5           common to multiple states.

6           MS. RYBAKOFF: Yes, your Honor, that's correct.

7           THE COURT: And I take it the idea would be that the  
8           common briefing, if you will, presumably Mississippi would  
9           contribute to that to the extent it addresses the federal  
10          question matter separate and apart from the timeliness issue  
11          relating to removal on that ground in Mississippi, is that  
12          correct?

13          MS. RYBAKOFF: That's correct, your Honor.

14          THE COURT: And then I noticed in the letter that  
15          North Carolina, I take it, has an argument that S&P waived its  
16          right to remove by filing a designation to transfer the case to  
17          the North Carolina Business Court. I presume that would be in  
18          the same brief as well.

19          MS. RYBAKOFF: We would propose to address that in the  
20          common brief as well, your Honor.

21          THE COURT: Then the issues in the Mississippi  
22          specific brief, if you will, I presume would be two, number  
23          one, that timeliness of the federal question removal notice,  
24          and number two, the issues relating to the 2011 removal in the  
25          CAFA issues and diversity jurisdiction, is that correct?

D7BTSTAC

1 MS. RYBAKOFF: That's correct, your Honor.

2 THE COURT: So as an initial matter, as I said, I'm OK  
3 with that proposal. Anyone wish to be heard on structuring it  
4 that way, turn then to the question of timing and the like?

5 Good. So as I said, that does raise the question of  
6 timing, in particular, putting aside the briefing schedule for  
7 a moment, the issue Mr. Rubins alluded to, namely whether to  
8 have the Mississippi specific issues, and that is the issues  
9 relating to the 2011 removal, briefed now in conjunction with  
10 the other briefing or put off until later.

11 I am strongly inclined to do it now. I don't see any  
12 reason to put it off. I agree that it may ultimately be moot,  
13 but there are various scenarios in which it would not be moot,  
14 and I think having multiple rounds of briefing in the case  
15 would just delay the action further, and that action in  
16 particular has been pending for a while. All which have is to  
17 say I don't see any reason to wait on it.

18 I know there's a pending Supreme Court decision that  
19 may speak to some of the issues as well, although I looked at  
20 the petition for certiorari in the case and it seems to me the  
21 questions presented in that case really relates to definition  
22 of "mass action" under CAFA. And we'll discuss this in a  
23 moment, but I am inclined to think that might not be relevant  
24 to the issues in this case, which is to say I don't think  
25 there's a reason to wait for the Supreme Court on that either,

D7BTSTAC

1 particularly since there's also various scenarios in which I  
2 don't reach the question. All that is to say as threshold  
3 matter I'm inclined to reach the issues in conjunction with the  
4 rest of the jurisdictional briefing.

5           Anyone wish to be heard on that? And then we can  
6 discuss the discovery related issues next.

7           MR. RUBINS: Yes, your Honor, Joshua Rubins for  
8 Moody's.

9           I would only say, your Honor, that I believe that  
10 there is some likelihood that in any scenario the Moody's and  
11 S&P 2011 removal, remand issue might not be ripe for your  
12 Honor's attention. If you decide that the federal question  
13 grounds for removal generally does not apply, I assume that the  
14 MDL would probably not go forward. In the event that you did  
15 decide that S&P was ripe in its argument, there would be no  
16 reason to find -- reach a conclusion on the 2011 remand issues  
17 as to S&P. And I believe that the primary if not sole ground  
18 that the MDL cited for including Moody's here in this MDL was  
19 the possibility of conflicting rulings on the 2011 remand  
20 issue. And if in fact if you found in S&P's favor, it might be  
21 that you decide to send Moody's back to Mississippi for a  
22 ruling there and not reach a ruling as to the CAFA issue as to  
23 S&P.

24           I wanted to mention that possibility, which is part of  
25 what drove our recommendation. I do think that, as to the

D7BTSTAC

1 Supreme Court issue, which may not at all be determined in your  
2 Honor's view of the timing, that we do believe that that  
3 determination would be likely relevant to this action.

4 THE COURT: OK. I hear you, and certainly think you  
5 made those arguments in the letters. I think although there  
6 are various scenarios in which I could imagine I don't have to  
7 decide the CAFA issues, I think for the reasons I described I  
8 think it does make sense to brief it simultaneously because  
9 there are some areas in which I might. And in any event, I'm  
10 not sure it makes sense to kick that can further down the road  
11 and send it back to Mississippi with the issue still undecided.  
12 So on that issue, we'll brief them all simultaneously.

13 That raises the question of the pending motion for  
14 remand related discovery in Mississippi. I understand from  
15 your 28th letter, Mr. Abrams, June 28th letter, the parties  
16 appear to be in agreement that I can decide that issue based on  
17 the existing papers. Does everyone agree with that? And then  
18 we can turn to the discussion of the issue.

19 MS. LIU: Your Honor, Mississippi is not in agreement  
20 with that. To the extent that the defendants continue to  
21 insist on moving for remand related discovery, which we believe  
22 is wholly unnecessary to determine the real party in interest  
23 question here, Mississippi would want to file a supplemental  
24 opposition because, as the Court is aware, those papers were  
25 briefed on the circuit law, and the Second Circuit is clear

D7BTSTAC

1 that the law of the transferring court controls, and we would  
2 want an opportunity to be able to brief supplemental responses  
3 under Second Circuit and the law of this Court.

4 THE COURT: OK. Am I correct in assuming that if I  
5 deny the motion you wouldn't see the need for supplemental  
6 briefing?

7 MS. LIU: That's correct, your Honor.

8 THE COURT: Let's turn to the merits of that issue. I  
9 assume everybody is in agreement that Second Circuit law does  
10 affect my decision on that issue, whether based on the existing  
11 briefing or supplemental briefing.

12 Is that correct, Mr. Rubins?

13 MR. RUBINS: That's correct.

14 THE COURT: Mr. Abrams?

15 MR. ABRAMS: Yes.

16 THE COURT: Here are my thoughts for the motion, and I  
17 will hear from counsel. Number one, I'm curious to hear  
18 from -- I'll call you defense counsel for present purposes,  
19 although obviously it's more complicated than that. As far as  
20 I can tell, there are sort of a handful of decisions that deal  
21 with very similar issues, Judge Arterton's opinion in  
22 Connecticut v. Moody's in 2011, Judge Thompson's opinion in a  
23 case of the same name in 2009, and the Mississippi v. AU  
24 Optronics case that the court granted cert on, and the Second  
25 Circuit's decision which I'll have more to say about in a



D7BTSTAC

1 moment in Purdue Pharma earlier this year.

2 I'm curious, I did not see anything in any of those  
3 cases any court suggest that discovery was warranted and  
4 piercing the pleadings, as I think the Second Circuit put it in  
5 Purdue Pharma, was warranted. Which I'll talk about the merits  
6 in a moment, but I'm curious if anyone can cite any precedent,  
7 any court in similar circumstances that granted discovery on  
8 these issues.

9 MR. RUBINS: Yes, your Honor, I can't cite a case that  
10 is on all fours in terms of the specific CAFA issue here.  
11 Certainly this Court has granted remand related discovery in  
12 another CAFA context, the Anwar v. Fairfield Greenwich Ltd.  
13 case, 2009 Westlaw 11181278.

14 Is that the only thing -- you want me to rest at this  
15 point, your Honor? I agree that in the cases which deals  
16 specifically with this real party in interest issue, I'm not  
17 aware of and cannot cite you a case where there has been remand  
18 related discovery.

19 THE COURT: And what was the issue in the case that  
20 you just cited to me?

21 MR. RUBINS: I believe the issue in that related to  
22 numerosity, which is also an issue here.

23 THE COURT: OK. Let me give you my thoughts on the  
24 merits, because it strikes me that a lot of the briefings that  
25 I read from the Mississippi District Court sort of the misses

D7BTSTAC

1 the boat for the following reason. It seems to be addressing  
2 largely the mass action prong of CAFA, but as far as I can  
3 tell, the notice of removal in this case listed two grounds for  
4 removing the case: one, the class action prong of CAFA; and  
5 two, the diversity statute, which is complete diversity in a  
6 more basic sense.

7 I understand that the statute is a little bit  
8 convoluted, and there is a provision that defines a mass action  
9 as a class action. I would say that there's nothing finding a  
10 class action is a mass action, which is to say I'm not sure  
11 it's a two-way street. If you look at the Second Circuit's  
12 decision in Purdue Pharma v. Kentucky I mentioned a moment ago,  
13 704 F.3d 208 (2d Cir. 2013), a January decision, the court  
14 there, on very similar facts, basically separates mass action  
15 from class actions and says the only thing -- the notice of  
16 removal in that case cited only the class action component.  
17 The Court noted in a footnote that there was probably a good  
18 reason for that because the mass action is not transferable  
19 under the MDL statute absent approval of the majority of the  
20 members of the masses, if you will, and basically treated the  
21 two definitions as entirely distinct.

22 Given that, I'm inclined to think that discussion of  
23 whether this constitutes a mass action or not just isn't  
24 actually the issue in this case, and that there are two grounds  
25 for removal, whether it qualifies as a class action and whether

D7BTSTAC

1 there is complete diversity. With respect to the first issue,  
2 I am hard pressed to see how we distinguish this case from  
3 Purdue Pharma where the court held that a parens patriae  
4 action, in that case brought by Kentucky, does not qualify as a  
5 class action for purposes of CAFA, and furthermore rejected an  
6 argument for, as I said before, piercing of pleadings and  
7 trying to evaluate the real party in interest and basically  
8 decide it as a matter of law based on the pleadings and the  
9 relevant statutory language, and didn't look behind that in any  
10 way that would suggest that discovery was warranted. So far  
11 that reason, I'm inclined to think that discovery is not  
12 necessary for that prong.

13 As I mentioned, there was the second basis for  
14 removal, complete diversity under 1332. In that the instance,  
15 I think, frankly, it's also a little bit missing the boat in  
16 the sense the question is not whether or not there are  
17 individuals in Mississippi who are real parties in interest and  
18 have a stake in the outcome of the litigation, but whether the  
19 state is a real party in interest, which is to say that one  
20 could find that the state and the individuals are real parties  
21 in interest. In which case, it would defeat complete  
22 diversity, because I assume everybody agrees that the state is  
23 not a citizen of Mississippi for purposes of the diversity  
24 statute. Putting that another way, I think the relevant  
25 question is not whether there are individual citizens in

D7BTSTAC

1 Mississippi who are real parties in interest here but whether  
2 the state is, and I don't think that the discovery that you are  
3 have asked for gets to that issue, and I think it would be not  
4 necessary to decide the question.

5 All of which is to say -- and Judge Arterton's opinion  
6 in the 2011 case just provides an approach to that issue and  
7 decides that case in a very similar context in a way that  
8 doesn't suggest to me that discovery is necessary. All of  
9 which is to say that I'm inclined to think that the issues can  
10 be decided as a matter of law based on the existing record,  
11 including the limited discovery that has been provided, and I  
12 don't really see the need for further discovery.

13 Those are my thoughts. I'm happy to hear from you.  
14 You can try to persuade me to rethink it. If you do, I would  
15 be curious to how would you distinguish Purdue Pharma since it  
16 does seem to be quite close to this case.

17 MR. RUBINS: I will attempt to do so, your Honor. I  
18 appreciate the opportunity. I think the Purdue case footnote  
19 really quite clearly provides the reason why this is  
20 appropriately treated and analyzed as a mass action. I mean  
21 the footnote says that --

22 THE COURT: Which footnote?

23 MR. RUBINS: I thought maybe it's the same one you  
24 were referring to, Number 4. And where it says that the  
25 peculiar drafting of the statute, and quoting another court,

D7BTSTAC

1 gives mass action the character of a kind of statutory Janus;  
2 under CAFA, a mass action simultaneously is a class action for  
3 CAFA's purposes and is not a class action. And for that  
4 reason -- that's one reason. For that reason, when the initial  
5 notice of removal removed as a class action, that included mass  
6 action within that definition. And so we believe this  
7 ultimately is removed potentially as a mass action and is  
8 appropriately treated that way.

9 Second of all, I do think -- and I can't cite your  
10 Honor authority --

11 THE COURT: Can I ask you, with respect to that, how  
12 do you square that with the fact that the court itself  
13 acknowledged the statutory language with the rest of the  
14 opinion in which it very clearly says Purdue Pharma did not  
15 remove this case as a mass action, it relied solely on the  
16 class action, so therefore we're not going to address the mass  
17 action? On your argument that a class action is a mass action,  
18 the Court couldn't have done that, it would have had to address  
19 that.

20 MR. RUBINS: I think, your Honor, that kind of ties  
21 into my second point on this issue, which is that unlike the  
22 filing of complaints, for example, the filing of a notice of  
23 removal can be clarified and explained in subsequent briefing.  
24 And I think -- my reading of the Purdue case is that a mass  
25 action was simply not something that was being argued, it

D7BTSTAC

1 wasn't a matter of you didn't use the right words in the notice  
2 of removal, it's you're not speaking mass action. Therefore,  
3 this body of law related to treatment of mass actions doesn't  
4 apply. And I think in this case our notice of removal is  
5 proper because it cited the appropriate statute.

6 THE COURT: It did not cite the mass action component  
7 of it, it cited 1332(d)(1).

8 MR. RUBINS: I believe, your Honor, it cited something  
9 that includes mass action within the definition of class  
10 action.

11 THE COURT: It does not.

12 MR. RUBINS: I will take your word for it.

13 THE COURT: Thank you.

14 MR. RUBINS: And I would say that subsequent  
15 discussion and briefing clarified the fact that it was a mass  
16 action that was at issue, and therefore Perdue's treatment of  
17 class action is not applicable here. And that the authorities  
18 we relied on from the Fifth Circuit, which are not in any way  
19 inconsistent with the Second and Third Circuit authority, would  
20 apply.

21 THE COURT: Let's assume for the moment that you can  
22 rely on the mass action prong of CAFA. And I think if you the  
23 look at your notice of removal you'll be hard to find any  
24 reference to it, but let's assume you can. Looking Footnote 5  
25 of Purdue Pharma, the Court goes on to say -- notes that the

D7BTSTAC

1 statutory definition of "mass action" explicitly excludes  
2 actions that, inter alia, assert claims "on behalf of the  
3 general public (and not on behalf of individual claimants or  
4 members of a purported class) pursuant to a State statute  
5 specifically authorizing such action, which was a quote from  
6 the Section 1332(d)(11).

7 Now how do you get past that?

8 MR. RUBINS: I think that's the issue before the  
9 Court, which is does the complaint --

10 THE COURT: When you say "the Court," do you mean me  
11 or the Supreme Court?

12 MR. RUBINS: Both. But I think our position has  
13 always been that this complaint, which does not simply claim on  
14 behalf of the general public, it asserts claims that could only  
15 be brought and could only refer back to individuals, in this  
16 case, purchasers of securities. So I don't think there's  
17 anything in -- I think the Purdue case, because it cites the  
18 Fifth Circuit case at the beginning of the decision, and it  
19 does discuss the Caldwell case and it discusses the fact that  
20 it's a minority view, it does not -- the Second Circuit has not  
21 taken a position on the treatment of the mass action in term of  
22 the analysis of the real parties in this.

23 THE COURT: Is there any court that has addressed or  
24 looked to -- done the real party in interest analysis with  
25 respect to the language of the statute that I just quoted from,

D7BTSTAC

1 namely whether the claims are asserted on behalf of the general  
2 public? In other words, the cases that I have seen, including  
3 Judge Thompson's decision in the 2009 case, I think, as well  
4 as -- well, I think that case and even the language at the end  
5 of Fifth Circuit's opinion don't suggest that you look at the  
6 real parties in interest for the purposes of that provision,  
7 but if it's brought on behalf of the state, that suffices. Is  
8 that wrong?

9 MR. RUBINS: My reading of the Fifth Circuit --

10 THE COURT: The Fifth Circuit might be an example.

11 MR. RUBINS: -- is that their reading is different.

12 And as I am probably familiar from the record and perhaps  
13 familiar or not with even a case as recent a couple week ago  
14 from the Northern District of Mississippi, all these cases that  
15 the attorney general of Mississippi has run in which they have  
16 asserted claims on behalf of some sector of the general public  
17 for not only civil penalties and injunctive relief, but whether  
18 they call it disgorgement or something else, benefits that  
19 arise on behalf of individuals, they have all been found to  
20 have been properly removed under CAFA.

21 And we believe that that is a body of law that should  
22 be applied here because it is not inconsistent, I believe, with  
23 Second Circuit law. It may be inconsistent with some lower  
24 court decisions in the Second Circuit, but not with Second  
25 Circuit law. And it seems highly appropriate for a case



D7BTSTAC

1 brought by the attorney general of Mississippi to decide it  
2 under the law that applies to all the other cases, and this  
3 would be an anomaly to not look to that law.

4 THE COURT: When you say "not look to that law,"  
5 meaning --

6 MR. RUBINS: The Fifth Circuit.

7 THE COURT: But you agree that Second Circuit law  
8 governs.

9 MR. RUBINS: I do agree that Second Circuit law  
10 governs, but I disagree if the law of the Second Circuit -- as  
11 opposed to the decisions you cited from Connecticut, the law of  
12 the Second Circuit I believe has not addressed this particular  
13 issue.

14 THE COURT: But you would agree, for example, to the  
15 extent that it comes down to whether I take the claim-by-claim  
16 approach as the Fifth Circuit did in Caldwell or the whole  
17 complaint approach as some district courts in this circuit have  
18 taken, you're agreed I'm not bound by the Circuit law on that  
19 question, correct?

20 MR. RUBINS: You are not bound.

21 THE COURT: And insofar as the Second Circuit did not  
22 reach it in Purdue Pharma, I'm basically free to make up my own  
23 law.

24 MR. RUBINS: You are, your Honor.

25 THE COURT: Anybody want to say anything else with

D7BTSTAC

1 respect to the discovery issue?

2 MR. RUBINS: Anything else I say about the discovery  
3 issue would sort depends on -- really depends on the Sixth  
4 Circuit body of law, and I think under that body of law we  
5 believe that certainly under that case law we believe --  
6 Moody's believes that discovery shouldn't be needed for the  
7 Court to the decide. But clearly the state disagrees, and the  
8 state has, from our point of view, sort of engaged in kind of a  
9 gamesmanship as to the pleading and avoided the core issue and  
10 tried to avoid the impact of all these cases. And the  
11 discovery that we framed was aimed at getting behind the  
12 pleading, as the Caldwell case urges, and to nail things down.

13 Clearly if your Honor decided that the Fifth  
14 Circuit -- that you would not consider any of the Fifth Circuit  
15 precedence, I would agree that our need for discovery would no  
16 longer exist. But if your Honor did decide that the Fifth  
17 Circuit law is applicable here or plays a role in the analysis  
18 here, I would still believe it could be helpful to clarify that  
19 all of these Fifth Circuit cases indeed are on all fours with  
20 our case. And also, because the state has, in the previous  
21 proceedings, said that there is not numerosity and we don't  
22 need the \$75,000 threshold of controversy at issue, on those  
23 issues, as in the Anwar case, we would want discovery, but I  
24 can see that your Honor's reasoning might lead to an  
25 elimination of the need for discovery.

D7BTSTAC

1 THE COURT: OK. I appreciate that concession.

2 Mr. Abrams, do you have anything to add?

3 MR. ABRAMS: No, your Honor.

4 THE COURT: One further question, Mr. Rubins. If,  
5 hypothetically, I were to rule that this case was not removable  
6 as a class action or on complete diversity grounds and that the  
7 Mississippi case was not removable as a federal question,  
8 either on timeliness grounds or on the merits, but found that  
9 it was removable as a mass action, what consequences flow from  
10 that given that the mass actions are not transferable to an MDL  
11 absent the consent of the mass members?

12 MR. RUBINS: I hope I followed, your Honor. I believe  
13 that we would not belong here and we would belong in the  
14 Northern District of Mississippi.

15 THE COURT: OK. Here's what I propose to do, I think  
16 for the reasons that I articulated, and given the concession  
17 Mr. Rubins made at the end there, I'm not inclined to think  
18 that the discovery is -- or I'm inclined to think that  
19 discovery may not be necessary, let's put it that way. I think  
20 there are paths that I could take that would render discovery  
21 more appropriate, but I'm not inclined, based on the  
22 speculative -- given that that is far from certainty, I'm not  
23 inclined to have discovery before briefing.

24 Now what I think would be appropriate, borrowing from  
25 Rule 56, Rule 56(d) has a provision that says where parties are

D7BTSTAC

1 opposing a motion for summary judgment and believes there are  
2 facts necessary to justify opposing the motion, that you can  
3 submit an affidavit or declaration basically identifying and  
4 articulating those facts, and the Court can then decide whether  
5 they're necessary or not and so forth.

6 And what I think might makes sense is to borrow from  
7 that, and in your opposition to Mississippi's motion you can  
8 file an affidavit that explains under what scenarios discovery  
9 would be warranted, why you think it would be warranted under  
10 the scenarios, and I would consider it in connection with my  
11 consideration of the merits of the issue. Given that there are  
12 some areas in which I don't think I would need to reach the  
13 issue, and if I go down the path where I do, then I will have  
14 your affidavit or declaration.

15 Any objection to proceeding that way?

16 MR. RUBINS: I think that's a great idea.

17 THE COURT: Thank you. And Ms. Liu, I would imagine  
18 that you would no longer want to do a supplemental briefing on  
19 discovery related issues.

20 MS. LIU: That's right, your Honor.

21 THE COURT: So I will deny the motion for remand  
22 related discovery without prejudice to renewing it in a fashion  
23 that I just described, but we'll proceed with the briefing on  
24 the remand issue both generally and in respect to Mississippi.

25 Let's talk about page limits for a moment, and the

D7BTSTAC

1 default rules in this district are 25 pages, 25 pages and 10  
2 pages for principal briefing, opposition briefing and reply.  
3 This is your moment to tell me if you think that that would be  
4 inadequate.

5 MS. RYBAKOFF: The states are content with those  
6 rules, your Honor.

7 THE COURT: Mr. Abrams?

8 MR. ABRAMS: Your Honor, we could live under those  
9 rules. I suggest, 35, 35, and 5. Just seems to me it's a  
10 matter of some moment for all the parties, and I think we could  
11 do a better job with a few more pages.

12 THE COURT: I'll tell you what, I tend to agree, given  
13 what is at stake and the significance of the issue. So I will  
14 give at least each side 35 pages for principal briefs and 15  
15 pages for the reply brief. And that applies to Mississippi  
16 specific briefing as well.

17 Let's turn to the motions to dismiss the declaratory  
18 judgment actions. I'm not sure there's quite as much that we  
19 need to the discuss on that score. I guess the only  
20 question -- I think the briefing is necessary given the Second  
21 Circuit law applies for my purposes. Any reason that we  
22 shouldn't just have it on the same schedule as we have on the  
23 remand motions?

24 MS. RYBAKOFF: The states would be content with that  
25 schedule as well, your Honor. That works.

D7BTSTAC

1 MR. ABRAMS: So would we, your Honor.

2 THE COURT: Great. So let's turn to that schedule.

3 And you have proposed that opening briefs be filed by August  
4 12, opposition briefs by September 11 and replies by  
5 October 1st. My question for you is: Why do you need that  
6 much time given all these issues have already been briefed?

7 MS. RYBAKOFF: Your Honor, the only thought there was  
8 that we had to recast our briefing in the context of Second  
9 circuit law and also review the various briefs to ensure that  
10 all the state positions are covered. But we can certainly --  
11 we would be happy to expedite it and consider any alternatives  
12 that the Court may wish to suggest.

13 THE COURT: Mr. Abrams?

14 MR. ABRAMS: I agree with that, your Honor, that in  
15 the drafting of this the representatives of the states  
16 indicated they needed a good deal of time for coordination  
17 internally, but that's their problem. We can live with any  
18 schedule that you set.

19 THE COURT: Mr. Rubins?

20 MR. RUBINS: The same for us, your Honor.

21 THE COURT: OK. So I'm inclined to move things a  
22 little bit more quickly on theory that these are not new issues  
23 for most of the people in this room. And given that, I'm not  
24 going to give you all quite as much time as you were asking  
25 for. I will have the opening briefs due on August 2nd. Am I

D7BTSTAC

1 messing up vacation plans as I give you an August -- late  
2 August deadline?

3 MR. ABRAMS: We don't take vacations.

4 THE COURT: Glad to hear it. I will give three weeks  
5 for opposition, so they will be due on August 23rd, and then  
6 two weeks for -- well, given Labor Day, I will give you until  
7 September 16th to file replies.

8 Anyone wish to be heard on that?

9 All right. Now I understand that everybody would like  
10 to have oral argument. I suppose that's fine with me. Am I  
11 correct that everybody would like it?

12 MR. ABRAMS: Yes, your Honor.

13 MS. RYBAKOFF: Yes, your Honor, unless the Court feels  
14 it's not necessary. The issues are pretty straightforward.

15 THE COURT: OK, why don't we go ahead, given we have  
16 so many people involved here, and schedule something. And if  
17 between the submission of the briefs and that date I decide  
18 it's not necessary, it will be more easy to cancel it than  
19 schedule it.

20 So let's look at -- did I say September 16 was your  
21 reply date? I think I meant September 9. I hate to so quickly  
22 take back a gift, but I'm going to make it September 9. Let's  
23 look at -- how is the first week in October, morning of  
24 October 4th for counsel? Is that fair to everybody?

25 MR. ABRAMS: That's fine with us.

D7BTSTAC

1 MS. RYBAKOFF: That's fine with the states, your  
2 Honor. Would that also include the declaratory judgment action  
3 arguments, the motions to dismiss?

4 THE COURT: I would think so. I would think we would  
5 do them all together.

6 MS. RYBAKOFF: Thank you.

7 THE COURT: Anyone else need wish to be heard on that?  
8 So schedule oral argument for October 4th, say 10 o'clock in  
9 the morning. And I'm guessing we'll be in this courtroom, but  
10 you should make sure to check the docket beforehand because, as  
11 you know, this is not my usual courtroom, so it will depend a  
12 little bit on what is available, but I will be sure to post it  
13 in advance of that date.

14 Anything else on the briefing of the motion front that  
15 we need to address? I think that covered what we needed to  
16 cover, is that correct?

17 MS. RYBAKOFF: Yes, your Honor.

18 THE COURT: OK. Let's turn then to other pretrial  
19 proceedings, and here are my questions for everyone: Based on  
20 your letters, it seems like you have all agreed that discovery  
21 and the like should be stayed pending my decision on these  
22 motions. My question is: Why? It's not as if these motions  
23 are dispositive in the sense the cases will disappear, it's  
24 just a question of where they would proceed, in federal court  
25 and state court, and there are other related actions pending



D7BTSTAC

1 already elsewhere. Why not just use the opportunity to proceed  
2 and get started on that? And what's the point in staying  
3 discovery?

4 MS. RYBAKOFF: Your Honor, the states recently gained  
5 access to documents that were collected by the Securities and  
6 Exchange Commission. They have been placed in a repository.  
7 There's a considerable amount of information that has been  
8 made, maybe two and a half million documents. We actually  
9 underwent training recently on the process organizing and  
10 reviewing that information, and we believe once we get through  
11 the information we'll be in a better position to plan discovery  
12 and tailor it more specifically to the issues that we want to  
13 focus on and also target depositions. So from our standpoint,  
14 it was a matter of internally conducting this review and then  
15 being in a better position to begin formal discovery or paper  
16 discovery.

17 THE COURT: How long would you anticipate that process  
18 of review would take?

19 MS. RYBAKOFF: What we proposed with our briefing  
20 schedule, we would like to have several months, at least. And  
21 what the states would like to propose is that the Court agrees  
22 and the remand matter is resolved, and assuming for any reason  
23 that we remain here, that we have the opportunity to confer  
24 again and work out a schedule because we'll be in a much better  
25 position to estimate what our needs are, we'll know what the

D7BTSTAC

1 schedules are in the related cases that are pending out there.  
2 So if we can time it to begin after remand is decided, I think  
3 that would work best for all the parties here.

4 THE COURT: Mr. Abrams?

5 MR. ABRAMS: Your Honor, we don't have a strong  
6 position on that either way. Those two and a half million  
7 pages that they're talking about are our documents that we  
8 turned over to the SEC and which they appear to have. I'm glad  
9 they're busy, but we would be prepared to start earlier. But  
10 in accommodation to the states, we are also prepared to wait  
11 until your Honor rules.

12 THE COURT: Mr. Rubins?

13 MR. RUBINS: I'm not sure if we're in exactly the same  
14 position. I'm not sure if the documents described are  
15 documents related to Moody's, and Moody's has certainly  
16 produced millions of pages to various entities. I don't know.  
17 But in any case, we certainly would abide by what the states  
18 want to do with the extra caveat that because Moody's is  
19 separate and the issues are completely different, that we be on  
20 a separate track, and it would seem more efficient to wait and  
21 see what the states want to do.

22 THE COURT: OK. I'll tell you what I'm going to do.  
23 Since we're going to be back here on October 4th -- in all  
24 likelihood be back here on October 4th, I will defer that  
25 question of setting a schedule for discovery and the like until

D7BTSTAC

1 then on the theory that, number one, I'll have a slightly  
2 better sense of the jurisdictional issues, and number two, it  
3 will give you an opportunity to confer between now and then  
4 with respect to basically having a conference and more specific  
5 discussions regarding deadlines.

6 I will tell you I understand from the letters that  
7 this is a disagreement that the states would want a year for  
8 document discovery and nine months for depositions -- sorry,  
9 ten months for depositions, and S&P proposes nine months and  
10 six months respectively. I am strongly inclined to go to S&P's  
11 way on that and move things along, particularly if we're not  
12 going to do it today, which is to say you have between today and  
13 October 4th to engage in review of those documents. And I  
14 strongly urge you to use your time wisely, because you're not  
15 going to get as much time as you would like, or you may not get  
16 as much time as you would like when I set the deadlines.

17 MS. RYBAKOFF: We appreciate that, your Honor. We  
18 were doing our best to estimate the scenario in terms of what  
19 would happen if we had to go this route, but I think we'll be  
20 in a much better position by the 4th to make a better  
21 assessment.

22 THE COURT: So I will direct that you confer with  
23 respect to deadlines going forward. Obviously, those deadlines  
24 may ultimately be moot depending on my ruling on jurisdictional  
25 issues, but if they're not, I do want to set them so they're in

D7BTSTAC

1 place and you don't need to come back a third time since there  
2 are a lot of parties involved and I went to get things moving.

3 I think in light of that, that may be all we need to  
4 address today. The remaining pretrial deadlines and the like  
5 can wait until that time. I don't also think we need to  
6 discuss the resolution of discovery disputes and the like since  
7 there isn't going to be formal discovery between now and  
8 October 4th, but are there other issues we should be addressing  
9 today?

10 MR. ABRAMS: No, your Honor.

11 MS. RYBAKOFF: No, your Honor.

12 THE COURT: OK. I do want to ask, because it's my  
13 practice to ask at virtually every civil conference, about the  
14 prospects for settlement and whether there's anything that the  
15 Court can do to facilitate settlement. I understand from S&P's  
16 letter it doesn't view settlement discussions or further  
17 settlement discussions as fruitful at this time, but it's my  
18 practice to ask.

19 So why don't I start with you, Mr. Abrams.

20 MR. ABRAMS: Every case can be settled, your Honor.  
21 Having been through extensive exchange of views in Washington  
22 and elsewhere, it simply doesn't seem to us that this time is  
23 really a perspicuous time to try to do that. We're just  
24 beginning, as your Honor knows, with a federal case in  
25 California, just beginning here. And while we don't object to

D7BTSTAC

1 sitting and talking, we really, just with all candor, don't  
2 think it is the best time right now to go down that road.

3 THE COURT: OK. Anyone else wish to be heard on that?

4 MS. RYBAKOFF: Your Honor, the only comment the states  
5 would make is that many times in these cases defendants  
6 approach the enforcement actions as if they were private  
7 actions, and some of the issues, the different perspectives on  
8 the legal questions and defenses I think have to do with that  
9 distinction. But once we get through the remand, I think that  
10 may go a long way towards better positioning the parties for  
11 future settlement talks.

12 THE COURT: OK. Given that, and given the  
13 sophistication of the parties involved here, I'm not -- it  
14 doesn't sound like there's any reason to do anything at this  
15 stage, but if for some reason that changes even before you  
16 anticipate it does, you can submit a letter to me requesting  
17 whatever assistance I can provide in that regard and I'm happy  
18 to refer to you magistrate or mediation or what have you, but I  
19 will take my leave from you on that score.

20 As I said at the outset, I asked S&P to submit an  
21 proposed order consistent with the rulings that I have made and  
22 the deadlines that I set today, and I want that by close of  
23 business on Monday. You need to email a PDF proposed order to  
24 the orders and judgments clerk the court, and I ask you email a  
25 version in Word to me just in case I want to make any

D7BTSTAC

1 modifications to it. I would ask that you show it to  
2 co-counsel and to Mr. Rubins before you submit it just to make  
3 sure that everybody is on the same page on that score.

4 Anything else that we need to do today?

5 MS. RYBAKOFF: Nothing from the states, your Honor.

6 MR. ABRAMS: Nothing, your Honor.

7 MR. RUBINS: Nothing, your Honor.

8 THE COURT: Thank you, everyone, again for your very  
9 helpful letters that helped me prepare, and the matter is  
10 adjourned. Thank you.

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